

Justice delayed is justice denied: Court of Final Appeal's re-statement of law on strike out applications for delay in light of Civil Justice Reform

Introduction

The power to strike out claims for delay is discretionary and derives from the inherent jurisdiction of the Court, which jurisdiction exists to avoid injustice, prevent abuse and facilitate the administration of justice. In the recent case of *The Liquidator of Wing Fai Construction Company Limited (In Compulsory Liquidation) v Yip Kwong Robert and Ors*¹, the Court of Final Appeal (**CFA**) restated the principles relevant to applications to strike out for delay in light of the Civil Justice Reform introduced on 2 April 2009 (**CJR**). In short, the CFA has emphasised the importance of reducing delay in proceedings and the Court's active case management powers, which ultimately affects how parties conduct litigation and their litigation strategies.

¹ FACV 3/2011

The facts

The three Respondents are former directors of Wing Fai Construction Company Limited, which had been wound up in 2002. In August 2004, the company's liquidator initiated proceedings against the Respondents alleging, amongst other things, breach of duty in respect of some HK\$33 million paid from the company to parties closely linked to the Respondents, without any apparent consideration. The Respondents applied for further and better particulars and for discovery in late 2004, but subsequently withdrew the application following provision of further particulars by the liquidator. A defence was filed in late 2004. Following the filing of additional evidence by the liquidator, the Respondents made a second application for further and better particulars and discovery in mid-2005, answered by the liquidator in April 2006. There followed two years of inactivity until 22 May 2008, when the liquidator issued a summons of directions.

In August 2008, the Respondents applied for the claims to be struck out for delay. The application was dismissed by the Court of First Instance, which decision was upheld by the Court of Appeal.

The law

As the principles relevant to striking out for delay largely originated from cases decided before the introduction of the CJR (and its equivalent in the UK), the CFA found it necessary to restate the applicable principles and gave leave to appeal on that basis.

Whilst some of the principles in those cases survive in the CFA's restatement (as set out below), the cases are effectively no longer authoritative.

Impact of the CJR - change in litigation culture

The CFA firstly examined the changes brought by CJR, specifically its intention to bring about a change in litigation culture including by:

- ensuring that parties' disputes are resolved as expeditiously as possible;
- eliminating delays in and increasing the cost effectiveness of litigation;
- importantly, active case management by the Court, whereby it takes an active role in setting milestones in the action and progressing it expeditiously to trial. Previously, conduct of the cases was left in the hands of the parties, with inevitable delays;
- promoting the duty of litigants and their legal representatives to assist the Court in furthering the objectives of the CJR; and
- reducing interlocutory proceedings which serve little purpose other than prolonging proceedings.

The CFA noted that the Court has the following powers to enforce its case management powers where there has been non-compliance:

Key issues

- The facts
 - The law
 - Impact of the CJR – change in litigation culture
 - Applicable principles
 - The CFA's decision
 - Implications
- to make peremptory orders where delay occurs (for example, an order that a party which fails to file witness statements by a certain date is precluded from ever filing witness statements);²
 - to impose conditions such as ordering that the offending party pay the amount in dispute into Court;³
 - power to act on its own motion, without application of the parties;
 - making adverse costs orders including for immediate payment of costs or assessing costs on a punitive basis;⁴ and
 - as a last resort, striking out an action or defence.

The main point stated by the CFA is that post-CJR - given the Court's case management powers and the duty of litigants and their

² O.1B r.1

³ O.1B r.1(3)(a)

⁴ O.62 r.5(1)(aa) and O.62 r.5(1)(e)

representatives to assist the Court in avoiding delays - applications to strike out for delay should be rare as very few cases should reach the stage where delay would prompt such an application.

Previously, strike out actions had been prompted by extended periods of delay or inactivity in litigation which had gone unsupervised and unpunished by the Court, often with defendants "letting sleeping dogs lie", that is, letting unprosecuted cases lie dormant in the hope that sufficient delay would be accumulated so that some sort of prejudice could be asserted.

Applicable principles

The CFA then set out the following applicable principles:

- the Court now has more powers (as set out above) to deal with delay. Striking out is a remedy of last resort and should only be ordered in plain and obvious cases.
- mere delay is insufficient. There must be an abuse of the process of the Court.
- abuse of Court processes can take many forms. It includes (as held under the so-called second limb in the pre-CJR case of *Birkett v James*⁵) inordinate and inexcusable delay causing real prejudice such as a substantial risk that a fair trial will not be possible; or

the prejudice caused by an interim injunction pending trial whereby undue delay might aggravate that prejudice.

- where abuse of Court processes is clearly demonstrated, proceedings can be struck out even where prejudice to the other party cannot be shown. However, in the majority of applications, the element of prejudice will be extremely relevant.
- in respect of the practice known as 'warehousing' of claims, whereby a plaintiff initiates a number of proceedings against various people and then, for tactical reasons or otherwise, selectively proceeds only with certain actions, the CFA held that merely for a party to start proceedings and then delay will not necessarily amount to an abuse justifying strike out. The appropriate remedy in such cases may be for the Court to exercise some of its new CJR powers. In order to justify a strike out, it must be shown that the plaintiff had no intention to bring proceedings to a conclusion (as held in pre-CJR case of *Grovit v Doctor*⁶) or there was a complete disregard of the rules of Court.
- in considering delay, the Court should have regard to various factors including the length of delay, excuses put forward, the

degree to which the parties have failed to observe the rules of the Court, and the extent to which the respective parties had contributed to the delay.

- the conduct of parties in conducting the proceedings and, in particular, any failure by parties to fulfil their obligations of assisting the Court in furthering the underlying objectives of the CJR, would be relevant. Accordingly, defendants will no longer be able to adopt the attitude of "letting sleeping dogs lie" as explained above.
- contrary to the previous pre-CJR position, the fact that the relevant limitation period has not expired and is not close to expiring will no longer militate against an order for striking out. Having regard to the rights of other litigants and the effective use of the Court's resources, it would be for the plaintiff to initiate fresh proceedings and bear the burden of justifying why it should be permitted to continue with the fresh action.

The CFA's decision

Having regard to the above principles, the CFA dismissed the appeal, finding that the Courts below were correct to dismiss the Respondent's strike out application, on the following grounds:

- although the liquidator had been guilty of inordinate and

⁵ [1978] AC297

⁶ [1977] 1 WLR 640

inexcusable delay for the two year period from 19 April 2006 to 22 May 2008, there was no other special feature so as to amount to an abuse of Court processes justifying a strike out;

- further, the two year delay took place before the CJR came into effect, at a time when the liquidator was perhaps not expected to do as much to move the proceedings along. The CFA did note, however, that in the post-CJR era, a delay of two years would almost inevitably involve several breaches of Court rules and orders, and may be indicative of an intention not to bring proceedings to a proper conclusion;
- there was no evidence to support the allegation that the liquidator did not intend to bring the proceedings to a conclusion or that there had been a disregard of the rules or orders of Court. On the contrary, the Respondents had not taken any steps to progress the proceedings; and
- there was no prejudice to the Respondents, and no evidence that a fair trial would not be possible.

Implications

In considering to bring proceedings, parties should be aware that they will have to progress their claims. They cannot adopt a litigation strategy of simply filing a writ and delaying.

As defendants, parties must also progress their defence and the action generally: they cannot employ delaying tactics or let "sleeping dogs lie" as they may have done so in the past.

As parties will now have to actively pursue their cases (either as plaintiffs or defendants), they will incur more upfront costs in formulating their case and collating evidence. However, this will - strategically - allow plaintiffs to put more pressure on defendants and also let both parties know the real strengths and weaknesses of their case. Together with other CJR initiatives, including mediation and the sanctioned offers and sanctioned payments regime, this will facilitate the earlier settlement of disputes. Pre-CJR, parties usually only knew the strengths of their cases closer to trial.

Conclusion

In its decision in *Wing Fai*, the CFA has gone to some length in emphasising the importance of eliminating delay in litigation, primarily through active case management, following the CJR.

The CJR has effectively eliminated the need for strike-out applications for delay: parties can no longer adopt a strategy of delay and now have a duty (and will be ordered by the Court) to actively progress their claims and defences.

Helpfully, these reforms will encourage parties to resolve their disputes at an earlier stage in proceedings, with less cost and delay.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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